In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,
vs.
PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Elisha Edwards, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 10, 1967.

CITATIONS TO OPINIONS BELOW

The memorandum decision of the United States District Court for the Northern District of California

(R. 85-86), dated March 18, 1966, is unreported and is printed in Appendix A hereto, *infra*. The opinion of the Court of Appeals for the Ninth Circuit (R. 90-91) is not yet reported at the time of this writing and is reprinted in Appendix B hereto, *infra*.

JURISDICTION

The decision and judgment of the Court of Appeals was entered on May 10, 1967. (R. 89, 92.) Petitioner herein did not seek a rehearing before the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Is Pacific Fruit Express Company a "common carrier by railroad" and therefore subject to liability under the Federal Employers' Liability Act where:

(a) it owns, controls, operates and services the largest fleet of refrigerated railroad cars and trailers in the United States;

(b) it controls the movement of its cars in transit;

(c) it holds itself out to the public as providing common carriage of perishable commodities by rail;

(d) it owns extensive railroad terminal, service and repair properties and facilities;

(e) it owns railroad tracks and locomotives which it uses in its operations;

(f) it is required to report its financial data to the Interstate Commerce Commission, using a form of accounts prescribed by the I.C.C., and to maintain its railroad equipment in compliance with the Federal Safety Appliance Act;

(g) it charges for the use of its railroads cars on the basis of the *distance* goods are carried in its cars;

(h) its employees are continuously exposed to the identical hazards faced by employees of operating railroads generally; and,

(i) it engages solely in operations having to do only with the railroad industry?

STATUTE INVOLVED

The statute central to this petition is Section 1 of the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. §51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death

of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

This action arises under the Federal Employers' Liability Act and seeks damages for injuries caused petitioner, Elisha Edwards, while acting in the course of his employment by respondent, Pacific Fruit Express Company (P.F.E.), at Roseville, California. The complaint (R. 1-3) reflects that on November 9, 1963, petitioner was employed by respondent in furtherance of respondent's interstate commerce operations; because of the careless and negligent maintenance of appliances and premises by respondent,

petitioner was seriously and permanently injured when he was completely enveloped in burning gasoline; as a result, petitioner is disabled and disfigured and has prayed for general damages in the sum of One Million Dollars in addition to his special damages. Respondent's answer (R. 4-6) admits that it is a Utah corporation acting in interstate commerce; that petitioner was employed by respondent at the time of the accident; that petitioner was injured in the course of his employment;[1] and that it has in fact been necessary for petitioner to receive an as yet undetermined amount of medical care for his injuries. The employment in which petitioner was engaged when he sustained these injuries involved making respondent's railroad freight cars ready for the transportation of perishable commodities in interstate commerce by railroad. (R. 37.)

The general facts and circumstances surrounding the events and injuries are not, at least for present purposes, at issue. Shortly after interposing its answer, respondent moved for summary judgment (R. 10), alleging immunity from liability under the Federal Employers' Liability Act as a matter of law, and the district court granted the motion after concluding that Pacific Fruit Express Company is not a "common carrier by railroad." Because judgment occurred in the infancy of this litigation, the record is of ne-

[1]This follows from respondent's Sixth Affirmative Defense (R. 6) alleging payment of temporary workmen's compensation benefits for which the employment relationship to the injury would be a prerequisite to the application of California Labor Code § 3201 et seq. (industrial accident compensation).

cessity fragmentary and is primarily concerned with facts showing the actual nature of respondent's operations.[2]

Pacific Fruit Express is "one of the oldest refrigerator car companies" in the United States.[3] It engages some four thousand employees (R. 71), most—if not all—of whom have joined railroad labor unions formed as "brotherhoods" with which P.F.E. has entered into collective bargaining agreements.[4] Respondent owns, controls, operates and services the largest fleet of refrigerated railroad cars and trailers in the United States, consisting of twenty-five thou-

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[2]Verbatim extracts from the record used in this petition to describe respondent's business activities come solely from documents authored by respondent unless specifically indicated to the contrary. In fact, all data in the record illustrating respondent's activities was obtained from the hand of respondent, i.e., its affidavit supporting the motion for summary judgment (R. 34-39) and the publications introduced below by petitioner (R. 70-76), the origin and authenticity of which are not disputed by respondent. The publications are informally obtained advertising literature but are nevertheless admissible in evidence against respondent [Rule 43 (a), Federal Rules of Civil Procedure; California Evidence Code §§ 1220-1222, incorporating the provisions of former California Code of Civil Procedure § 1870 (2)] and, having been introduced in the district court without objection, they constitute material which may properly be used against respondent.

[3]Since its organization in 1907, P.F.E.'s sole shareholders have been Union Pacific Railroad Company and Southern Pacific Company. (R. 34.) Respondent maintains that there are no joint managerial or labor employees.

[4]Respondent so advised the district court in an affidavit filed on its behalf in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir. 1949). See 2555 Records of the U.S. Court of Appeals, Number 12062, TR 34. Respondent still maintains the same labor arrangements and deals with a railroad clerical brotherhood of which petitioner was a member at the time of the accident. Complete information is not presently available as to the number or identity of the railroad brotherhoods with which respondent now negotiates.

sand three hundred refrigerator boxcars, 2730 mechanical cars, and 1000 "Ice-Tempco" cars[5] (R. 70) and constituting essentially thirty per cent of the refrigerated railroad rolling stock in the nation.[6] Respondent aptly describes itself as the "nation's largest operator of refrigerated rail cars." (R. 71.)

Rail deliveries of perishable commodities which require protection against heat and cold "were handled by railroads even as far back as 100 years ago" (R. 71) and do not represent a modern innovation in the railway industry. An estimated one million railroad carloads of perishable commodities now move in the United States every year, and P.F.E. "originates and otherwise handles about 280,000 carloads or approximately 28% of the nation's total."[7] (R. 71.)

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[5]"Ice-Tempco" refers to the presence in the freight cars of "units for constant operation of air-circulating fans while under load to produce controlled temperatures." (R. 73.) The continuous involvement of P.F.E. with the commodities while being transported is further illustrated by the fact that P.F.E. also advertises "TEMPCO-VAN SERVICE" involving ownership and use of 400 refrigerated highway trailer-containers for receipt and delivery of goods and 200 "piggyback" rail flat cars to carry the containers. (R. 70.)

[6]Respondent during the year 1965 also operated 1946 refrigerator cars and 474 flat cars leased from the Southern Pacific Company and 1742 refrigerator cars and 474 flat cars leased from the Union Pacific Railroad Company. Interstate Commerce Commission, Annual Reports, *Transport Statistics in the United States*, Part 9, p. 7 (1965). It is unknown whether these leased cars are reflected in the figures cited above as published by respondent or whether they represent an additional aspect of respondent's railway car operations. In any event, respondent operates rolling stock owned by operating rail carriers as well as its own cars.

[7]The record reflects the existence of several other private refrigerator car companies (R. 71) but is silent regarding the organizational structure or actual operations of any but respondent. It is known, however, that respondent's transportation activities are considerably more extensive than those of at least one

Respondent is able "to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country" (R. 71) as well as controlling the movement, direction and handling of cars in transit under what are termed its "Car Service Operations."[8] Pacific Fruit Express advises consumers that

> TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of peristable transportation.*
>
> Shippers and consignees want their shipments transported speedily and smoothly *and delivered to the market in top condition.*[9]

Respondent advertises, moreover, that it has "offices and agencies in all principal Western producing areas" and in "all major receiving and consuming areas." (R. 70.)

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other refrigerator car company which does *not* service its rolling stock but simply leases its cars while an independently contracted company ices and otherwise services the railroad cars. See *Hetman v. Fruit Growers Express Company,* 346 F.2d 947 (3d Cir. 1965), which is therefore distinguished from the present case.

[8]These consist "in large part of car distribution, the furnishing of commodity protective services *as ordered by the shipper,* and . . . diversion and passing service." (R. 74, italics added.) Car distribution "involves the provision of cars at proper places at the proper times" in condition to transport perishables. Diversion operations are explained as involving the rerouting of freight cars by respondent whenever the shipper calls P.F.E. to request a change in destination; passing service involves notification to the shipper by P.F.E. of the precise location of each car bearing the shipper's goods.

[9]Respondent itself has provided these italics in the original publication, thereby deliberately emphasizing the carriage of goods as opposed to the servicing of rail cars.

Respondent describes its own *en route* services in a manner most suggestive of a kinetic carriage activity as distinguished from a static and limited rental and ice service:

> [Refrigerator trailers and cars] are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service and convenience of pick-up and delivery. (R. 73-74.)
>
> . . . [I]f after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. . . . In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. . . . We have sizable diversion forces at Chicago . . . [which] are aware at all times where each and every loaded car may be and we keep shippers informed when their shipments "pass" certain points. . . . (R. 74-75.)

In 1965 P.F.E.'s cars accounted for over one billion miles of railroad car movement in the United States.[10]

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[10] I.C.C., *Annual Reports, supra,* note 6. By comparison, in 1962 the estimated total freight car-miles by all "Class I railroads" (traditional railroad corporations, excluding terminal companies, switching roads, and particularly small railroad companies) was approximately twenty-seven billion miles. U.S. Dept. of Commerce, *Statistical Abstract of the United States* (1963), No. 787, p. 579.

All of respondent's rolling stock illustrated in its brochures, and also plainly visible to passersby on railroad or highways, clearly bears respondent's name, while the insignia of its owners appear in distinctly subordinate detail. The public, moreover, is exhorted to contact P.F.E. directly "for the finest in perishable transportation service throughout America" since respondent maintains "offices in principal cities to supply your needs fast—wherever you are." (R. 70.) Perhaps most revealing is the fact that P.F.E. facilitates direct contact with the consumer by holding itself out to the public in major cities across the United States as a carrier by railroad. A random sampling revealed that P.F.E. is listed—under its own corporate name—in the recent classified telephone directories of Minneapolis,[11] Omaha,[12] Sacramento,[13] and San Francisco[14] under the index heading *"Railroad Companies"* and of Chicago,[15] Cincinnati,[16] Cleveland,[17] Denver,[18] Detroit,[19] Kansas City (Kansas and Missouri),[20] Pittsburgh,[21] Portland (Oregon),[22]

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[11] p. 557 (November, 1966).

[12] p. 333 (1966).

[13] p. 576 (January, 1967). Petitioner's injuries were sustained at respondent's terminal located but a short distance from Sacramento, California.

[14] p. 761 (1966).

[15] p. 1650 (1966).

[16] p. 534 (June, 1966).

[17] p. 809 (April, 1966).

[18] p. 643 (July, 1966).

[19] p. 1164 (September, 1966).

[20] p. 620 (February, 1967).

[21] p. 636 (December, 1966).

[22] p. 629 (1966-1967).

Salt Lake City,[23] Seattle,[24] and Tucson[25] under the heading *"Railroads"*.

Pacific Fruit Express owns extensive terminal and service properties and facilities, none of which is or was wholly or partially owned by Southern Pacific or Union Pacific, respondent's owners. (R. 35.) Respondent maintains and operates five car shops at which railroad freight cars are built and repaired at various locations in the United States and has supplemental light repair and cleaning stations at a number of places through the western states.[26] (R. 72.) Respondent operates eleven ice manufacturing plants nationally and also purchases ice from other commercial concerns to meet its refrigeration demands. (R. 72.) *Deliveries of ice are made on railroad tracks owned by respondent, and repairs are accomplished by hauling cars over tracks owned by P.F.E. by means of locomotives also owned by respondent.* (R. 37.) Respondent is not only required to operate and maintain its own railroad equipment in compliance with the Federal Safety Appliance Act[27] but also undertakes

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[23]p. 356 (June, 1966). This, it should be noted, is respondent's state of incorporation.

[24]p. 584 (March, 1966).

[25]p. 319 (June, 1966).

[26]Common carriers by railroad, it appears, characteristically maintain and operate facilities for the construction and repair of their own stock. Cf. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955).

[27]27 Stat. 531, 45 U.S.C. §1 et seq. This fact was found and reported by the California District Court of Appeal in *Pacific Fruit Express v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607 (1944). That court also noted that maintenance and repair of respondent's railroad cars was accomplished both at its own facilities and, occasionally, at railroad repair shops owned by other companies. *Id.*

to repair railroad equipment owned by other companies at P.F.E. maintenance facilities.[28]

Respondent's revenues are generated by charging rates varying from 4.5 to 5.25 cents per mile for the use of each of its railway cars.[29] (R. 35.) Respondent's fees, therefore, are regularly based not on the providing of refrigeration service to a particular company for a specified term, nor on the length of service of a railroad car, nor on the actual cost of providing the services, but directly on the distance of the carriage of goods.[30] Respondent "files financial data with the Interstate Commerce Commission" which also prescribes the form of accounts to be used by respondent. (R. 35.) P.F.E.'s contracts are subject to approval by the I.C.C. before becominng operative,[31] thereby giving the Commission de facto regulatory authority over respondent's rates. Conversely, Pacific Fruit Ex-

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[28]See findings of facts by the district court in *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651, 654.

[29]*Id.* Respondent may on occasion lease a refrigerator car directly to a shipper on a monthly basis.

[30]The fact that respondent customarily issues no bill of lading or statement of charges directly to the shipper but instead relies upon contracting carriers to collect and forward its revenues is immaterial to any of the issues in this action. See *Union Stockyard v. United States,* 308 U.S. 213 (1939), where Union Stockyard was found to be a common carrier by rail notwithstanding the fact that *all* of its services and charges were rendered solely and directly to railroad companies and in no respect to the general public.

[31]*Gaulden v Southern Pacific Co, supra.* The court also found that the contract with respondent's owners, approved by the I.C.C. in 1942, provided for indemnification by P.F.E. of its owners against liability for injury or damage to personnel or property of the owners while acting on behalf of P.F.E. and fixed responsibility of P.F.E. for damage to any freight as a result of any improper service on its part.

press "does not report to the California Public Utilities Commission, nor to any other state utilities commission." (R. 35.)

The district court believed that the Federal Employers' Liability Act does not embrace respondent's operations as reflected by this record. The Court of Appeals, believing that "[w]ere the slate clean, we might well be convinced by [petitioner's] argument for a broader definition," elected nonetheless to revivify the strict construction applied originally by the district court in 1948 in *Gaulden v. Southern Pacific Company,* 78 F.Supp. 651 (N.D. Calif. 1948), aff'd without further opinion 174 F.2d 1022 (9th Cir. 1949), the earliest decision to approach the question of Employers' Liability Act application to a railway refrigeration company.

REASONS FOR GRANTING THE WRIT

Although the Employers' Liability Act may be the most litigated statute in American law, the judicial literature is almost totally barren of any conscientious effort to define the boundaries of this remedy. The crucial operative phrase, "common carrier by railroad", has been subjected only to the most superficial analysis, usually *en passant,* during the sixty year history of the act and is now urgently in need of judicial amplification lest a chance misconstruction become the means of depriving thousands of railroad employees of the protection established by Congress. In 1964 over six thousand persons were employed by

railroad refrigeration companies owned or controlled by other railroads,[32] and they are foreclosed from recovery under the Employers' Liability Act notwithstanding the fact that their employment continuously exposes them to the identical hazards which confront railroad workmen generally. Moreover, the entire fabric of the F.E.L.A. is now jeopardized by a regressive force contrary to modern construction of the act, for the decision of the court below is not limited in its impact to petitioner or his co-workers. It can easily be predicted, for example, that an identical question will soon present itself in the rapidly expanding area of trailer-on-flatcar (TOFC or "piggyback") operations.[33]

A. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER FEDERAL AND STATE COURTS

Petitioner is mindful of the fact that Pacific Fruit Express Company has been involved in earlier Employers' Liability Act litigation on three occasions, in each instance as a co-defendant with one of its owners. *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp.

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[32] I.C.C., Annual Reports, *Transport Statistics in the United States, supra,* Part 9, p. 7 (1965).

[33] In the wake of the decision in *American Trucking Associations, Inc. v. Atchison, T. & S.F. Ry. Co.,* ..... U.S. ....., 18 L.Ed.2d 847 (1967), affirming the right of motor carriers to utilize transportation by rail in place of exclusively highway transport, one must expect continued expansion of railroad activities by companies handling TOFC operations almost exclusively but not organized within traditional "railroad" concepts. It thus seems inevitable that the question must soon arise as to the appropriate remedy for a "piggyback" workman injured in the preparation or execution of carriage of goods by railroad flatcar but not employed by a general service railroad.

651 (N.D. Calif. 1948), aff'd without opinion 174 F.2d 1022 (9th Cir. 1949); *Moleton v. Union Pacific Railroad,* 118 Ut. 107, 219 P.2d 1080 (1950), cert. den. 340 U.S. 932 (1951); *Aguirre v. Southern Pacific Co.,* 232 Cal.App.2d 636, 43 Cal.Rptr. 73 (1964). *Moleton* and *Aguirre,* uncritically and without renewed scrutiny, rely almost exclusively upon *Gaulden,* the California court finding the facts in all three actions to be substantially identical. 232 Cal.App.2d at 645, 649. The present case, however, clearly presents important and unresolved questions essentially of first impression. In contrast to each of the earlier suits, petitioner has not joined either of respondent's owners as a party defendant. Nor has petitioner sought to impute any of the operations of P.F.E.'s owners to respondent itself as was done in each of the other suits. Most significantly, each of the prior actions suffered from concentration on questions of agency, the contract between P.F.E. and its owners, joint enterprise and other theories directing attention *away* from a close examination of respondent itself.

Plaintiff in *Gaulden* made no real effort to show P.F.E. to be a common carried by railroad. His brief argument on this point was limited to urging the Court of Appeals to so find (if it rejected his intended approach to the case) simply because "Congress by the 1939 amendment to the Federal Employers' Liability Act liberalized and broadened the scope of the Act as to what constitutes interstate commerce. . . ." Brief for Appellant [Gaulden], 7-8, 2555 Records of the U.S. Circuit Court of Appeals, Number 12062. In

Moleton, the petitioner devoted only a very minute part of his brief accompanying his petition for a writ of certiorari to urge that "these employees of the express company are engaged in railroad work the same as persons in the general employ of the railroad company itself." Brief for Petitioner [Moleton], 33, 4163 United States Supreme Court Records, October Term, 1950, No. 468. Each of the earlier suits directed all of its thrust to the proposition that P.F.E. was essentially an alter ego of an operating rail carrier. Each shared a common shortcoming: court and counsel engaged in a fruitless search for *the* railroad—as between respondent and one of its owners—as if there could be convincing force in the bare fact that respondent commonly works *with* railroad companies. It was this attitude, taken by the court below and consisting of a harsh and narrow view of the problem, which militates in favor of review by this Court to bring respondent into the acceptable modern approach to the Employers' Liability Act.

The court below refused to attach significance to the most current pronouncement of this Court regarding the breadth of the F.E.L.A. One cannot reasonably presume that the unambiguous language of *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184, 189-190 (1964), is without great impact in this action:

> The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act or the Railway Labor Act, ... If Congress made the judgment that, in view of the

> dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provisions to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act.

Congress enacted broad protection for the working man against the perils of interstate rail commerce. It is the "danger to be apprehended" that invokes the shield of federal legislation, and it is immaterial from which segment of the railroad industry the peril may emanate. *United States v. California,* 297 U.S. 175, 185 (1936). This Court long ago determined that Congress intended to utilize the maximum reach of its authority to protect the railroad working force in interstate commerce "no matter what the source of the dangers which threaten it." *Mondou v. New York, N. H. & H. R. Co.,* 223 U.S. 1, 51 (1912) (the Second F.E.L.A. Cases).

The dangers of railroad work, the difficulties of recovering adequate compensation for railroad-associated injuries, the threat of injury to interstate commerce and persons engaged in furthering commerce are all present in respondent's operations in the same manner and to the same degree that they exist in the business of any general rail carrier. This is made more apparent by the fact that respondent's operations include every one of the elements found

to be significant in *Parden* in defining a common carrier by railroad.[34]

Whether a company such as respondent is a common carrier under federal railroad legislation depends upon what it in fact does, not upon its corporate character or its defensive protestations when threatened with suit. *United States v. California, supra,* 297 U.S. 175, 181. *Parden* stands for an uninterrupted judicial policy that the substance of a company's operations determines its F.E.L.A. status. The court below rejected this cardinal principle and adopted a peculiarly narrow approach toward the Employers' Liability Act.

In reaching its conclusion, the court below also rejected another distinguished line of cases which is both cogent and relevant in this discussion—the terminal company decisions. A terminal company ordinarily prepares, services, supervises and occasionally

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[34] At the outset, the *Parden* opinion describes those features of the Terminal Railway which make it "undisputably a common carrier by railroad engaging in interstate commerce":

> Consisting of about 50 miles of railroad tracks . . ., it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit. . . . It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods . . . ; maintains its equipment in conformity with the Federal Safety Appliance Act . . . ; and complies with the reporting and booking requirements of the Interstate Commerce Commission. *Id.*, 377 U.S. at 185.

Respondent too owns tracks, serves shippers and other carriers with its facilities, operates in conjunction with other railroads, endeavors to be profit making, operates in interstate commerce, has labor agreements with railroad brotherhoods, complies with the various safety appliance acts and regulations, and handles its financial records in compliance with regulations promulgated and supervised by the I.C.C.

operates railroad equipment between journeys and rarely acts upon the equipment while it is actually in use crossing state lines.[35] As such these businesses provide a service to general service rail carriers, own little and sometimes no railroad track or equipment, and—most significantly— differ from respondent in that they exercise *no control* over the actual interstate management and carriage of goods. There does not seem to be any instance of a terminal company holding itself out to the general public by advertising or directory listing as a common carrier by railroad. Nonetheless, because of the intimate involvement of terminal companies in interstate railroad commerce, they are included within the operation of the Interstate Commerce Act, *Union Stockyards v. United States,* 308 U.S. 213 (1939), the Hours of Service Act, *United States v. Brooklyn Eastern District Terminal Co.,* 249 U.S. 296 (1919); *Bush v. Brooklyn Eastern District Terminal Co.,* 218 N.Y.S. 516, 218 App. Div. 782 (1926), the Federal Safety Appliance Act, *United States v. California, supra,* 297 U.S. 175; *McCullough v. Jacksonville Terminal Co.,* Fla. App., 176 So. 2d 345 (1965), and—most notably—the Federal Employers' Liability Act. *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (6th Cir. 1941); *Maurice v. California,* 43 Cal.App.2d 270, 110 P.2d 796 (1941). In *McCabe v. Boston Terminal Co.,* 303 Mass. 450, 22 N.E.2d 33 (1939), the Massachusetts Supreme Court had no hesitation in finding the ter-

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[35]See *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (6th Cir. 1941); *McCullough v. Jacksonville Terminal Co.,* Fla.App., 176 So.2d 345 (1965).

minal company to be included under the Federal Employers' Liability Act but applied strict rules in the construction of the statute of limitations applicable thereto. This Court granted certiorari and, in a Per Curiam decision, rejected the narrow procedural holding of the lower court and reversed, thereby permitting the plaintiff therein to amend his pleadings to state a valid cause of action. 309 U.S. 624 (1940).

An organic interpretation of the F.E.L.A. as remedying hazards and wrongs inherent in an entire system of transportation is threatened by a highly particularistic and narrow philosophy, applied by the court below. This clash is apparent and of resounding significance. Resolution by this Court is essential. It is insufficient to rest upon the out-dated line of so-called "express company" cases. The *obiter dictum* of Justice Van Devanter in *Wells Fargo v. Taylor,* 254 U.S. 175, 187 (1920), certainly does not now suffice—if ever it truly did—to resolve this problem; to define a common carrier by railroad as "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier" wholly distorts the expressed will of Congress in this field. This completely ignores such railway operations as terminal companies, as well as other less generalized railroad operations which have since been brought within the F.E.L.A.[36] Yet the tired

[36]See, for example, *Eddings v. Collins Pine Company,* 140 F. Supp. 622 (N.D. Calif. 1956). This well-reasoned opinion found a lumber company which wholly owned and controlled a small railroad corporation to be a common carrier by railroad even though the lumber company was not organized as a railroad carrier under traditional lines.

reasoning of *Wells Fargo,* not even essential to the resolution of the question presented in that case, is too frequently resurrected to provide a shelter from the F.E.L.A. notwithstanding the total readjustment of interstate commerce thinking after the revolution of New Deal legislation and litigation.[37] The early tendency to narrow and dilute the F.E.L.A. which occupied much of the judicial literature during the first two decades following its enactment has been abandoned. The clear and explicit Congressional mandate for broad application has been recognized in almost every area of the railroad industry save the one presently before this Court.[38]

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[37]Respondent devoted a substantial portion of its argument to the district court to an exposition of the *Wells Fargo* decision. (R. 16.)

[38]*Wells Fargo* cannot be credited with any vitality in approaching the present question. It represents only a gratuitous finding that the express company was not *the* common carrier by railroad involved in that case. It is noteworthy that express companies have subsequently been recognized and classified as common carriers, and any exclusion of the application of the F.E.L.A. arises from their lack of railroad appliances and facilities rather than from any shortage of transportation activities in interstate commerce; they are common carriers by means other than railroad. *Fleming v. Railway Express Agency,* 161 F.2d 659 (7th Cir. 1947); *Jones v. New York Central,* 182 F.2d 326 (6th Cir. 1950); see also *Railway Express Agency v. Esformes,* 174 N.Y.S.2d 878, 12 Misc.2d 1038 (1958).

It bears comment that the court below cited *Hetman v. Fruit Growers Express Co., supra,* 346 F.2d 947 (3d Cir. 1965), as following *Gaulden.* The court in *Hetman,* however, decided that it "need go no further than to cite Gaulden . . . ." 346 F.2d at 949. Since the claimant in *Hetman* was not employed by the refrigeration car company, that decision suffers from the same defect as *Wells Fargo,* and any discussion of the status of the refrigeration company itself is *obiter dictum;* F.E.L.A. liability could not have attached to the car owner in any event since it did not employ the injured party. Moreover, Fruit Growers Express is significantly different in nature from respondent herein, and the *Hetman* decision is therefore distinguishable. See note 7 *supra.*

B. THE DECISION OF THE COURT BELOW PREVENTS UNIFORM APPLICATION OF A COMPREHENSIVE CONGRESSIONAL PROGRAM, LEAVING UNANSWERED SEVERAL QUESTIONS OF FAR REACHING SIGNIFICANCE

The Court of Appeals in this case has resurrected a barrier to the uniform application of the remedial legislative system governing the interstate transportation of commodities by rail. This totally ignored the development of the F.E.L.A. which has kept pace with the growth of remedial law generally, and in particular with the maritime sector. Compare, for example, *Southern Pacific Co. v. Gileo,* 351 U.S. 493 (1955), and *Guiterrez v. Waterman Steamship Corp.,* 373 U.S. 206 (1963).

> While government has rarely ever adopted a measure designed as a solution of some important social problem that could not be improved with time and experience, there has not yet been found any method of compensating injured railroad men and their next of kin that can be substituted satisfactorily for that provided by Congress in the FELA and the group of laws designed to supplement it. It has proved worthy to stand beside and in a position of equality with the remedies open to seamen, both in admiralty and in the law courts. Griffith, "The Vindication of a National Public Policy Under the Federal Employers' Liability Act," 1953, 18 Law and Contemporary Problems 160, 187.

It should be a matter of great and immediate concern that the decision of the court below flies in the face of this continuous trend toward liberalization by expressly electing to construe the central language of

the F.E.L.A. "narrowly" while rejecting the "broader definition" urged by petitioner. (R. 91.) The Court of Appeals candidly admitted its belief that the more remedial solution would be appropriate "were the slate clean," but nonetheless chose to adhere to the restrictive reasoning which was born of *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651.

This Court has heretofore had occasion to note the need for close scrutiny of the actions of lower courts in F.E.L.A. matters, since it requires rigorous supervision to insure that the beneficial purposes of that act not be thwarted by a "hostile philosophy." *Wilkerson v. McCarthy,* 336 U.S. 53, 69 (1948) (concurring opinion). The inference is inescapable from its brief opinion that the court below recognized the common carrier and railroad attributes of respondent and also observed the identity of railroad perils facing respondent's employees. Notwithstanding this, the Court of Appeals opted in favor of a judicial philosophy inimical to modern F.E.L.A. thinking.

It cannot be ascertained with any assurance whether construction of the crucial operative phrase "common carrier by rail" is properly a matter of fact or law.[39] Courts dealing with this language have, however, pro-

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[39]The distinction between a common carrier and a private carrier is often submitted to a jury for decision in analogous cases. Cf. *Arrow Aviation v. Moore,* 266 F.2d 488 (8th Cir. 1959) where the common carrier status of an air carrier was affirmed, the court relying in part upon the fact that the defendant advertised as a common carrier in telephone directories as does respondent herein; *Dairymen's Co-op Sales Assoc. v. Public Service Commission of Penn.,* Penna., 177 A. 770, 98 A.L.R. 218 (1935), where a marketing service for dairy concerns was found not to be a common carrier.

ceeded generally without hesitation to act by summary judgment or other summary procedures. Whether this question should more properly be addressed to the judgment of a court or a jury, it is plain that no soundness inheres in a determination made without reference to some applicable standard. Yet the decision below is not and cannot be explained in terms of any of the principles heretofore enunciated in the construction of the F.E.L.A. If this decision should pass unreviewed, the doors of the courts are closed to litigants—like petitioner—who labor under the very dangers which the F.E.L.A. was designed to alleviate.

The language of *Hamarstrom v. Missouri-Kansas-Texas R. Co.*, 233 Mo.App. 1103, 116 S.W.2d 280, 286 (1938), is illuminating:

> . . . [t]he expression "by railroad" in the federal statute is but descriptive of the kind of common carrier to which the statute relates, distinguishing railroads from common carriers of other kinds to which the act does not extend, and . . ., by the statute, it was not attempted or intended to define the kind of instrumentalities used on which their liability for negligence should exist or by which it should be limited . . . . (Citing Second Employers' Liability Cases, *supra*, 223 U.S. 1.)

Pacific Fruit Express Company has labored mightily to create for itself a treasured immunity from liability under the F.E.L.A. Nor is it presently subject to uniform state regulation, for it does not report to the California Public Utilities Commission or to any

other state utilities commission.[40] It now enjoys the incredible luxury of escaping responsibility under any comprehensive regulation or uniform liability system. Thus it is imperative that this Court act to establish guidelines to restore the symmetry desired by Congress in this field.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 2, 1967.

Respectfully submitted,
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[40]California Public Utilities Code § 202 excuses from the operation of that Code enterprises in interstate commerce. Were it not for this exemption, it appears that P.F.E. would be a common carrier by rail, under applicable California statutes. Pub. Util. Code § 229 includes all tracks, depots, yards, grounds, terminals and terminal facilities, and all other equipment used in rail transportation within the term "railroad"; § 230 defines a "railroad corporation" as every corporation which owns, controls, operates or manages any railroad in the state; § 211 declares every such railroad corporation to be a common carrier. Compare Arizona Constitution, Art. 15, § 10; Idaho Code Annotated §§61-113, 61-107; Montana Revised Code Anno. §§ 72:114, 72:115; Nevada Revised Statutes § 704.020; Oregon Revised Statutes § 760:010, all to the same general effect as the parallel California law.

(Appendices A and B Follow)